Affirmed Iron Dam
Morgan Davis v 18 Thornton 129
Passenger
the N Orleans cases
are heard —
17 Dec 72
Judge Miller
affirmed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 175

F. BARTEMEYER, SR., PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED MAY 29, 1872.

Dec 1873
Oct 2 1873

SUPREME COURT OF THE UNITED STATES.

No. 390.

F. BARTEMEYER, SR., PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

	Original.	Print.
Information	2	1
Justice Dowd's docket-entry	3	1
Demurrer	4	2
Motion to dismiss and quash	5	2
Justice Peters's docket-entry	6	3
Bill of exceptions	8	3
Demurrer	8	3
Ruling of circuit court on same	9	4
Motion to dismiss and quash	10	4
Ruling of circuit court on same	11	4
Record-entry of trial of cause in circuit court	11	4
Motion for conviction and judgment on defendant's plea	11	5
Motion in arrest of judgment	12	5
Ruling of circuit court on same	13	5
Motion for new trial	14	5
Written plea of defendant	15	6
Judgment-entry of circuit court	16	6
Appeal-bond	18	7
Notice of appeal	19	7
Acceptance of service of notice of appeal	20	8
Fine and costs in circuit court	21	8
Final judgment in supreme court of Iowa	23	8
Opinion of supreme court of Iowa	24	9
Costs in the supreme court of Iowa	26	9
Certificate of W. E. Miller, J.	27	10
Petition for writ of error	28	10
Bond in United States Supreme Court	30	11
Citation with acceptance of service indorsed	31	11
Writ of error	32	12
Assignment of errors	34	13

1 STATE OF IOWA
vs.
F. BARTEMEYER, S'N.

Be it remembered that, on the 7th day of April, A. D. 1871, there was filed in the office of the clerk of the supreme court of Iowa a transcript, in words and figures following, to wit:

2 STATE OF IOWA, *County of Scott, ss:*

Pleas before the circuit court of Iowa, at a term begun and holden in the county of Scott, on the 12th day of December, 1870, before the Hon. H. H. Benson, judge of the first circuit, seventh judicial district of State of Iowa.

THE STATE OF IOWA
vs.
F. BARTEMEYER, S'R. } On information for selling liquor.

Be it remembered that, heretofore, to wit, on the 21st day of March, 1870, there was filed in the office of the clerk of the circuit court in and for the county of Scott, information, demurrer, motion to dismiss and quash, and transcript, in words and figures, following, to wit:

STATE *State* OF IOWA
vs.
F. BARTEMEYER, S'R, F. BARTEMEYER, J'R. } Information, before T. B. Dowd, justice of the peace in and for Scott County, Iowa.

The defendants are accused of the crime of selling intoxicating liquors.

For that, in Davenport Township, Scott County, Iowa, on the
3 7th 8th days of March 1870, they, the defendants, did sell intoxicating liquors to one Timothy Hickey, and received pay of the said Hickey therefor, and that the said defendants are in the practice of selling liquors daily to parties otherwise than the above named Hickey, contrary to law and against the peace and dignity of the people of the State of Iowa.

JOHN MURRY.

STATE OF IOWA, *Scott County, ss:*

I, John Murry, being duly sworn, do depose and say that I know the contents of the foregoing information and know the statements therein contained to be true, as I verily believe. So help me God.

JOHN MURRY.

Subscribed and sworn to by John Murry, in my presence, this 8th day of March, 1870.

T. B. DOWD, *J. P.*

STATE OF IOWA
vs.
T. BARTEMEYER, S'R, T. BARTEMEYER, J'R.

J. Herron, for State.

4 Charge: Selling intoxicating liquors. Information filed by John Murry, M'ch 8, '70. Warrant issued Mc'h 8, '70, to police

John Murry, who served the same by arresting defendants and bringing them into court. Defendants not being ready for trial, continued to M'ch 11, '70, at 2 o'clock, p. m.

March 11, '70, adjourned to M'ch 15, '70, at one o'clock p. m. Defendant filed his affidavit for change of same and paid 50 c'ts for transcript. Change granted. Bl. Peters, J. P.

T. B. DOWD, *J. P.*

I hereby certify that the foregoing is a true and correct transcript of all my docket entries in this cause.

Davenport, M'ch 14, '70.

T. B. DOWD, *J. P.*

Before Bl. Peters, a justice of the peace in and for Scott Co. Iowa.

STATE OF IOWA
vs.
F. BARTEMEYER, S'R, F. BARTEMEYER, J'R.

Demurrer.

And now come the defendants, by their attorney, W. T. Dittoe,
5 and demur to the information, and, for cause, say:

1st. The act of the legislature of the State of Iowa, entitled, "An act for the suppression of intemperance," and the amendment thereto, is opposed to the common weal of the State of Iowa and the United States.

2nd. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendment thereto, under which these proceedings are instituted and prosecuted, is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States.

3d. The information contains matter which constitutes a bar to this prosecution.

W. T. DITTOE,
Plaintiff's Att'y.

Before Bl. Peters, justice of the peace.

STATE OF IOWA
vs.
F. BARTEMEYER, S'R, F. BARTEMEYER, J'R.

Motion to dismiss and quash.

And now come the defendants by their attorney, W. T. Dittoe,
6 and move the court to dismiss this cause of action, and that the proceedings be quashed, for the following reasons, viz: Because,

1. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendment thereto, is opposed to the common weal of the State of Iowa and the United States.

2. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendment thereto, under which these proceedings are instituted and prosecuted, is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States.

W. T. DITTOE,
Plaintiff's Att'y.

THE STATE OF IOWA
v.
F. BARTEMEYER, SR., F. BARTEMEYER, JR.

Information & papers.—Filed M'ch 15, '70.

In consequence of a change of venue from Justice Dowd's office—
7 Jos. Herron, att'y for the State, and W. T. Dittoe, for the defendant—
the defendant files a demurrer and motion to dismiss, on account of the unconstitutionality of the law whereon the information is based; and, after hearing the argument of counsel, adjourned till one o'clock, p. m., on the 18th of March, 1870. Now, to wit, this 18th of March, 1870, at one o'clock p. m., the defendants appear, with attorney and the prosecuting witness, and it is by me ruled that the demurrer is well taken, for the reason given by the defense and for the additional reason the prohibition liquor law is contrary to 26, art. 1, of the constitution of the State of Iowa, and grant the motion to dismiss. Excepted to by the counsel for the State. Suit dismissed. Plaintiff gives notice of an appeal. Mar., 1870.

BL. PETERS, *J. P.*

THE STATE OF IOWA,
Scott County, ss:

The foregoing is a true, complete, and perfect transcript of all pro-
8 ceedings in the above-entitled cause, as the same remain entered into my docket, at Davenport, in said county, this 18th March, 1870.

BL. PETERS, *J. P.*

And afterwards, on the 21st day of December, 1870, there was filed in the office of the said clerk a bill of exceptions, in words and figures following, to wit:

BILL OF EXCEPTIONS.

In the circuit court of the State of Iowa, in and for Scott County.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR., F. BARTEMEYER, JR. } Dec. term, 1870.

Be it remembered that, at the December term, 1870, of said court, and on the 16th day of December, 1870, this cause coming on to be heard on a demurrer to the information herein by defendant; which demurrer is in words and figures following, to wit:

Demurrer.

Before B'l Peters, justice of the peace in and for Scott Co., Iowa.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR., F. BARTEMEYER, JR.

9 And now comes the defendants, by their attorney, W. T. Dittoe, and demur to the information, and for cause say:

1st. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments thereto, is opposed to the common weal of the State of Iowa and of the United States.

2nd. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments thereto, under which these proceedings are instituted and prosecuted, is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States.

3rd. The information contains matter which constitutes a bar to this prosecution.

W. T. DITTOE,
Plaintiff's Att'y.

Whereupon the court overruled said demurrer; to which ruling the defendants at the time excepted.

10 And be it further remembered that, afterwards, on the same day, this cause coming on to be heard, on the motion of defendant to dismiss and quash the action; which said motion is in words and figures following, to wit:

Motion to dismiss and quash.

Before B. Peters, justice of the peace.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR., F. BARTEMEYER, JR.

And now come the defendants, by their attorney, W. T. Dittoe, and move the court to dismiss this cause of action and that the proceedings be quashed, for the following reasons, viz: Because—

1st. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments thereto, is opposed to the common weal of the State of Iowa and of the United States.

2nd. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments
11 thereto, under which these proceedings are instituted and prosecuted, is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and of the Constitution & laws of the United States.

W. T. DITTOE,
Plaintiff's Att'y.

Whereupon the court overruled said motion, and required the defendants to plead and go to trial; to which ruling the defendants at the time excepted.

And be it further remembered that, afterwards, on the same day, this cause, to wit, the cause of F. Bartemeier, s'r, defendant herein, came on for trial before the court, and the issues joined herein; and the plaintiff, to sustain the charge set out in the information and the issues on his part, offered and read to the court, as evidence, the written plea of said F. Bartemeyer, s'r, a copy of which is hereinafter set forth and filed in this court; and, on motion of the plaintiff, the said defendant was found guilty by the court on said written plea.

12 And be it further remembered that, at the said December term of said court, on the 17th day of December, A. D. 1870, this cause coming on for hearing, on a motion in arrest of judgment, by defendant F. Bartemeier, s'r; which motion is in words and figures following, to wit:

In circuit court of the State of Iowa, in and for Scott County.

Motion in arrest of judgment.

Dec. term, 1870.

THE STATE OF IOWA
vs.
F. BARTEMEYER, S'R, F. BARTEMEYER, J'R.

And now comes the defendant F. Bartemeyer, and moves the court in arrest of judgment in this cause, and for grounds, says:

1st. The law for the suppression of intemperance is opposed to the common weal of the State of Iowa, and of the United States.

2d. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments thereto, under which these proceedings are instituted and prosecuted, *is*
13 null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States.

3d. There is no crime charged in the information known to the law.

4th. The information charges more than one (1) violation of the law in a single count.

5th. The court erred in finding the defendant F. Bartemeyer, s'r, guilty upon his written plea.

6th. That it does not appear, from the whole record in this case, that a legal judgment could be pronounced by the court against the defendant.

W. T. DITTOE,
Att'y for Def't.

Whereupon the court overruled said motion; to which ruling of the court the defendant, at the time, excepted.

And be it further remembered that, afterwards, on the same day, this cause coming on for hearing, on a motion made by defendant for a new trial; which said motion is in words and figures following, to-wit:

14 *Motion for new trial.*

In the circuit court of the State of Iowa, in and for Scott C

THE STATE OF IOWA
vs.
F. BARTEMEYER, S'R, F. BARTEMEYER, J'R. } Dec. term, 1870.

And now comes the defendant F. Bartemeier, s'r, and moves the court for a new trial of this cause, and for grounds, says:

1st. The court erred in rendering judgment against the defendant on his written plea.

1st. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments thereto, is opposed to the common weal of the State of Iowa and of the United States.

2nd. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments thereto, under which these proceedings are instituted and prosecuted, is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States.

3rd. The information contains matter which constitutes a bar to this prosecution.

W. T. DITTOE,
Plaintiff's Att'y.

Whereupon the court overruled said demurrer; to which ruling the defendants at the time excepted.

10 And be it further remembered that, afterwards, on the same day, this cause coming on to be heard, on the motion of defendant to dismiss and quash the action; which said motion is in words and figures following, to wit:

Motion to dismiss and quash.

Before B. Peters, justice of the peace.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR., F. BARTEMEYER, JR.

And now come the defendants, by their attorney, W. T. Dittoe, and move the court to dismiss this cause of action and that the proceedings be quashed, for the following reasons, viz: Because—

1st. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments thereto, is opposed to the common weal of the State of Iowa and of the United States.

2nd. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments

11 thereto, under which these proceedings are instituted and prosecuted, is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and of the Constitution & laws of the United States.

W. T. DITTOE,
Plainttff's Att'y.

Whereupon the court overruled said motion, and required the defendants to plead and go to trial; to which ruling the defendants at the time excepted.

And be it further remembered that, afterwards, on the same day, this cause, to wit, the cause of F. Bartemeier, s'r, defendant herein, came on for trial before the court, and the issues joined herein; and the plaintiff, to sustain the charge set out in the information and the issues on his part, offered and read to the court, as evidence, the written plea of said F. Bartemeyer, s'r, a copy of which is hereinafter set forth and filed in this court; and, on motion of the plaintiff, the said defendant was found guilty by the court on said written plea.

12 And be it further remembered that, at the said December term of said court, on the 17th day of December, A. D. 1870, this cause coming on for hearing, on a motion in arrest of judgment, by defendant F. Bartemeier, s'r; which motion is in words and figures following, to wit:

In circuit court of the State of Iowa, in and for Scott County.

Motion in arrest of judgment.

Dec. term, 1870.

THE STATE OF IOWA
vs.
F. BARTEMEYER, S'R, F. BARTEMEYER, J'R.

And now comes the defendant F. Bartemeyer, and moves the court in arrest of judgment in this cause, and for grounds, says:

1st. The law for the suppression of intemperance is opposed to the common weal of the State of Iowa, and of the United States.

2d. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments thereto, under which these proceedings are instituted and prosecuted, *is*
13 null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States.

3d. There is no crime charged in the information known to the law.

4th. The information charges more than one (1) violation of the law in a single count.

5th. The court erred in finding the defendant F. Bartemeyer, s'r, guilty upon his written plea.

6th. That it does not appear, from the whole record in this case, that a legal judgment could be pronounced by the court against the defendant.

W. T. DITTOE,
Att'y for Def't.

Whereupon the court overruled said motion; to which ruling of the court the defendant, at the time, excepted.

And be it further remembered that, afterwards, on the same day, this cause coming on for hearing, on a motion made by defendant for a new trial; which said motion is in words and figures following, to-wit:

14 *Motion for new trial.*

In the circuit court of the State of Iowa, in and for Scott County.

THE STATE OF IOWA
vs.
F. BARTEMEYER, S'R, F. BARTEMEYER, J'R.
Dec. term, 1870.

And now comes the defendant F. Bartemeier, s'r, and moves the court for a new trial of this cause, and for grounds, says:

1st. The court erred in rendering judgment against the defendant on his written plea.

2nd. The finding of the court is contrary to the evidence in this case.
3d. The court erred in overruling the demur' to the information and motion to dismiss this cause.

W. T. DITTOE,
Att'y for Def't.

The written plea referred to in said motion, in arrest of judgment, and for new trial, is in words and figures following, to-wit:

In the circuit court of the State of Iowa, in and for Scott County.

15 *Plea.*

December term, 1870.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR., F. BARTEMEYER, JR.

And now comes the defendant, F. Bartemeyer, sr., and for plea to the information in this cause says: "He admits that at the time and place mentioned in said information he did sell and deliver to one Timothy Hickey one (1) glass of intoxicating liquor called whiskey, and did then and there receive pay in lawful money from said Hickey for the same. But defendant alleges that he committed no crime known to the law by the selling of the intoxicating liquor hereinbefore described to said Hickey, for the reason that he, the defendant, was the lawful owner, holder, and possessor, in the State of Iowa, of said property, to wit, said one glass of intoxicating liquor, sold as aforesaid to said Hickey, prior to the day on which the law was passed under which these proceedings are instituted and prosecuted, known as the act for the
16 suppression of intemperance, and being chapter sixty-four (64) of the revision of 1860; and that, prior to the passage of said act for the suppression of intemperance, he was a citizen of the United States and of the State of Iowa.

F. BARTEMEYER, S'R,
P'r W. T. DITTOE, *His Att'y.*

Whereupon the court overruled said motion for new trial, and proceeded to pass judgment against said defendant F. Bartemeyer, s'r, in words following, to wit: "On this 16th day of December, 1870, this cause coming on to be heard on defendant's demurrer to the information and motion to dismiss, W. T. Dittoe appears for the defendants, and J. Herron, esq., for the State of Iowa. After argument of counsel, the court overruled the demurrer and motion to dismiss, to which defendants except; and, on motion of plaintiff, the defendant F. Bartemeyer, jr., was discharged. Trial was then had before the court, (the de-
17 fendant, F. Bartemeyer, sr., waiving a trial by jury,) on his written plea. The court finds him guilty as charged. Defendant then moves in arrest of judgment and for new trial, which is overruled by the court; to all of which defendant excepts.

It is therefore ordered and adjudged, that defendant F. Bartemeyer, sr., pay a fine of twenty dollars and costs of this prosecution, taxed at nineteen $\frac{5}{100}$ dollars, and that execution issue therefor;" to which ruling of the court defendant at the time excepted. And this being all the evidence given and received on the trial of said cause and the rulings

of said court in said cause, the defendant, F. Bartemeyer, sr., asks the court to sign this, his bill of exceptions, and make the same part of the record in said cause, which is done accordingly.

H. H. BENSON, *Judge.*

And afterwards, on the 27th day of January, 1871, there was filed in the office of the said clerk an "appeal bond," in words and figures following, to wit:

18 STATE OF IOWA, *County of Scott:*

Know all men by these presents that we, F. Bartemeyer, sr., as principal, and
as sureties, are held and firmly bound unto the State of Iowa in the sum of one hundred ($100) dollars, well and truly to be paid to the State of Iowa. The condition of this bond is such that whereas the said F. Bartemeyer, sr., has appealed from the judgment of the circuit court of the State of Iowa, in and for Scott County, rendered on the 16 day of December, A. D. 1870, in an action then pending, wherein the said State of Iowa was plaintiff, and the said F. Bartemeyer, sr., and F. Bartemeyer, jr., were defendants, and wherein said F. Bartemeyer was fined by said court the sum of twenty dollars and costs: Now, if the said appellant shall pay to the said appellee the said fine of twenty dollars, or such part of said fine and all costs as the supreme court may
19 direct, and in all respects abide the orders and judgments of said supreme court on said appeal, then this obligation to be void; otherwise to remain in full force and virtue. Dated this 27th day of January, A. D. 1871.

F. BARTEMEYER, *Principal.*
M. FRAHM, *Surety.*
LOUIS MARTEN, "
A. HUNJE, "
F. WULF, "
H. O. SEIFFERT, "

And afterwards, on the same day, there was filed in the office of the said clerk a notice of appeal in words and figures following, to wit:

Notice of appeal.

In the circuit court of the State of Iowa in and for Scott County.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR., F. BARTEMEYER, JR.

To the above-named plaintiff, or to J. Herron, esq., att'y for plaintiff, and to M. D. Snyder, clerk of the circuit court of the State of Iowa, in and for Scott County:

20 You are hereby notified that defendant F. Bartemeyer, s'r, has appealed from the judgment of said circuit court, rendered in the above-entitled action, on the 16th day of December, A. D. 1870, to the supreme court of Iowa, and that said appeal will come on for hearing and trial at the argument term of said court, to be held at Davenport, commencing on the first Monday in April, A. D. 1871.

W. T. DITTOE,
Att'y for Def't.

I hereby admit due service upon me of the *written* notice of appeal, this 23d day of January, A. D. 1871.

J. HERRON,
Att'y for Plaintiff.
M. D. SNYDER, *Clk.*

STATE OF IOWA,
Scott County, ss:

I, M. D. Snyder, clerk of the circuit court of Iowa in and for Scott County, do hereby certify that the foregoing is a true and correct
21 transcript of all the pleading and record entry in the above-entitled cause, as they appear of record in my office, in the city of Davenport, Scott County, Iowa.

In witness whereof I have hereunto set my hand and caused the seal of said court to be affixed, at my office, in the city of Davenport, Scott County, Iowa, this 31st day of January, A. D. 1870.

[SEAL.] (Signed) M. D. SNYDER,
Clk of Circuit Court.

Bill of costs: Fine, 20.00; costs, 24.05; transcript, 6.00—$50.05.

22 *Journal entries.*

At an argument term of the supreme court of the State of Iowa, begun and held at the city of Dubuque, on Tuesday, the 18th day of April, A. D. 1871—present, the Hon. James G. Day, C. J.; Hon. Joseph M. Beck, Hon. William E. Miller, Hon. Chester C. Cole, judges—when the following, among other proceedings, were had and done, to wit:

FRIDAY, *April 21st*, 1871.

THE STATE OF IOWA
vs.
F. BARTMEYER, S'R, APP'L'T. } Appeal from Scott circuit court.

On this day, this cause coming up for hearing, is submitted to the consideration of the court on printed argument of counsel.

23 And, at the regular term of said court, held at Des Moines, on the 17th day of June, A. D. 1871, the same officers being present, the following entry was made in said cause:

THE STATE OF IOWA
vs.
F. BARTMEYER, S'N., APP'L'T. } Appeal from Scott circuit court.

This cause having been heretofore submitted to the consideration of the court, and the court being now fully advised in the premises, find there is no error in the judgment, and proceedings of the court below, and file their written opinion. It is therefore considered by the court that the judgment of the circuit court be, and it hereby is, affirmed, and that a writ of procedendo issue accordingly. It is further considered by the court that the appellee have and recover of and from the appellant the costs herein expended at this court, taxed at $, and that execution issue therefor.

24 *Opinion.*

Supreme court Iowa, June term, 1871.

THE STATE OF IOWA
vs.
F. BART'MEYER, SR., APP'L'T. } Appeal from Scott circuit court.

An information was filed before a justice of the peace of Scott County, in March, 1870, accusing the defendant of the crime of selling intoxicating liquors, contrary to statute, &c., specifying the facts. On a trial had, the defendant was found guilty, and adjudged to pay a fine of twenty dollars. He appealed to the circuit court, where another trial was had with a like result. He now appeals to this court.

W'm T. Dittoe, for appellant.

H O'Connor, att'y-gen'l, for the State.,

25 COLE, *J.*

The counsel for appellant has favored us with an elaborate printed argument in which he ass ails the "act for the suppression of intemperance," as "opposed to the common weal of the State of Iowa & the United States," and as "in conflict with, and in violation of the constitution of the State of Iowa and the Constitution and laws of the United States."

We regard these questions as settled by the former decisions of this court, and in view of the large amount of business before us, must content ourselves with simply refer'ing to and following them. (Our House No. 2 vs. The State, 4 G. Greene, 171; Zurnhoff vs. The State, Ibid., 526;) (Santo vs. The State, 2 Iowa, 165.)

It is, however, also urged, that the plea of defendant, admitting the sale, and which was read in evidence on the trial, avers that the defendant was the owner, holder, and possessor, in the State, of said intoxicating liquor at and prior to the passage of the law under which the prosecution was had. Even if this latter fact would constitute a defense, which we do not determine, yet it would not help the defendant's case, because the transcript fails to show that the admissions and averments of the plea was all the evidence, and other testimony may have shown that he did not so own and possess them.

Affirmed.

27 STATE OF IOWA,
Supreme Court:

I, C. Linderman, clerk of the supreme court of Iowa, do hereby certify that the foregoing pages contain a full, true, and complete copy of the transcript filed in my office in the cause of the State of Iowa vs. F. Bartmeyer, sn.; also a full, true, and complete copy of the record entries and opinion of said court in said cause, as full, true, and complete, as the same remain of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this 13th day of May, A. D. 1872.

[SEAL.] C. LINDERMAN, *Clerk.*

Costs supreme court, $14.25; transcript, 8.00—$22.25.

27 STATE OF IOWA, *ss:*

Supreme court of said State, June term, 1871.

THE STATE OF IOWA
v.
F. BARTEMEYER, SR.

It is hereby certified that, at a term of the supreme court of the State of Iowa, held at capitol of said State, at Des Moines, commencing on the first Monday of June, A. D. 1871, the above cause, upon final hearing was affirmed; and that in said cause the validity of a statute of the State of Iowa, on the ground that such statute was repugnant to the Constitution, treaties, and laws of the United States, was drawn in question; and that the decision of this court was in favor of the validity of the statute of said State of Iowa.

As witness my hand as associate justice of the supreme court of the State of Iowa, this 24th day of August, A. D. 1871.

W. E. MILLER,
Ass't Justice, S. C.

(Indorsed:) The State of Iowa v. F. Bartemeyer, sr., certificate of W'm E. Miller, associate justice of the supreme court of Iowa. Filed Aug. 24, '71. C. Linderman, cl'k.

28 *Petition for allowance of writ of error.*

STATE OF IOWA
vs.
F. BARTEMEYER, S'R.

To the Honorable , justice of the Supreme Court of the United States.

The petition of the above-named defendant F. Bartemeyer, s'r, for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Iowa, respectfully shows, that, at the June term, 1871, of said supreme court of the State of Iowa a judgment or decree in the above-entitled cause was rendered by said court against the said defendant, and that said judgment or decree is final.

And your petitioner further shows that there was drawn in question in said suit, the validity of a statu'e of or an authority exercised under said State of Iowa, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; and there was also drawn in question other matters, described in section two (2) of the act of Congress, passed and approved February 5th, 1867, (14 Stat., 386,) and that the decision of said supreme court of the State of Iowa was adverse to
29 the right, title, or exemption claimed by your petitioner under the Constitution, treaties, and laws of the United States, and it so appears of record. And that said supreme court is the highest court of law or equity in the State of Iowa, in which a decision could be had in said cause.

Therefore your petitioner most respectfully prays an allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Iowa, and that full and speedy justice may be done to said defendant; and that said defendant may be returned to

all things which he has lost by the rendition of said judgment or decree.

F. BARTEMEYER, SR.
Per W'M T. DITTOE, *His Att'y.*

Allowed by—

SAM. F. MILLER,
Asso. Jus. Sup. Court.

(Indorsed:) State of Iowa vs. F. Bartemeyer, s'r. Petition for allowance of writ of error. Filed May 8th, 1872. C. Linderman, clerk.

30 Supreme Court of the United States.

F. BARTEMEYER, S'R, PLAINTIFF IN ERROR,
vs.
THE STATE OF IOWA, DEFENDANT IN ERROR.

Know all men by these presents that we, F. Bartemeyer, s'r, M' Frahm, H. O. Seiffert, Geo. L. Davenport, and Ferd. Roddewig, residents of the city of Davenport, in the county of Scott, & State of Iowa, are held and firmly bound unto the State of Iowa, in the full and just sum of two hundred ($200) dollars, to be paid to the said State of Iowa; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 25th day of March, A. D. 1872.

Whereas the above-named F. Bartemeyer, s'r, hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Iowa:

Now, therefore, the condition of this obligation is such, that if the above-named F. Bartemeyer, s'r, shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force & virtue.

F. BARTEMEYER, SR. [SEAL.]
M. FRAHM. [SEAL.]
H. O. SEIFFERT. [SEAL.]
GEO. L. DAVENPORT. [SEAL.]
FERD. RODDEWIG. [SEAL.]

Sealed & delivered in the presence of—
W'M T. DITTOE.

Approved.

SAM. F. MILLER.

(Indorsed:) F. Bartemeyer, s'r, vs. State of Iowa. Bond. Filed May 8, 1872. C. Linderman, clerk.

31 The United States of America to the State of Iowa, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Iowa, wherein F. Bartemeyer, s'r, is plaintiff in error, and you are defendant in error,

to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sam. F. Miller, associate justice of the Supreme Court of the United States, this 1st day of April, in the year of our Lord one thousand eight hundred and seventy-two.

SAM. F. MILLER.

Due & legal service of this citation is hereby acknowledged & accepted for the defendant in error. Dated April 1, 1872.

HENRY O'CONNOR,
Att'y of Record for Def't in Error.
M. E. CUTTS,
Att'y-General of Iowa.

(Indorsed:) F. Bartemeyer, s'r, plaintiff in error, v. The State of Iowa, defendant in error. Citation to defendant. Filed May 8th, 1872. C. Linderman, clerk.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Iowa, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Iowa, before you, or some of you, being the highest court of law or equity in said State, in which a decision could be had in the said suit between the State of Iowa, defendant in error, and F. Bartemeyer, s'r, plaintiff in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein a title, right, privilege or immunity was claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed, by the said F. Bartemeyer, s'r, plaintiff in error, under such Constitution, treaty, s'atute commission, or authority, a manifest error hath happen'd, to the great damage of the said F. Bartemeyer, s'r, as by his complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

33 Witness the Honorable Salmon P. Chase, Chief Justice of the

said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. S.

Allowed by—

SAM. F. MILLER,
Asso. Jus. Sup. Court U. S.

Issued 1st April, 1872.

34 (Indorsed:) F. Bartemeyer, s'r, plaintiff in error, v. The State of Iowa, defendant in error. Writ of error to the supreme court of the State of Iowa. Filed May 8, 1872. C. Linderman clerk.

Assignment of errors.

Supreme Court of the United States.

F. BARTEMEYER, S'R,
v.
THE STATE OF IOWA.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said F. Bartemeyer, s'r, by W. T. Dittoe, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. That the supreme court of the State of Iowa erred in affirming the decision of the circuit court of the State of Iowa in and for Scott County, overruling the demurrer of the defendant to the information.

2nd. That the said supreme court of Iowa erred in affirming the decision of said circuit court, overruling the defendant's motion to dismiss this cause & *and* quash these proceedings.

3rd. That said supreme court of Iowa erred in affirming the decision of said circuit court, overruling defendant's motion in arrest of judgment.

4th. That the said supreme court of Iowa erred in affirming the decision of the said circuit court, sustaining the plaintiff's verbal motion, made in open court, and entered of record, for the conviction of the said defendant F. Bartemeyer, s'r, on the facts alleged in his written plea, filed in this cause, and holding said written plea insufficient in law to constitute a defense; which said written plea is in words and figures following, to wit: "And now comes the defendant F. Bartemeyer, s'r, and for plea to the information in this cause, says: He admits that, at the time and place mentioned in said information, he did sell and deliver to one Timothy Hickey, one (1) glass of intoxicating liquor, called whiskey, and then and there received pay in lawful money from said Hickey for the same. But defendant alleges that he committed no crime known to the law by the selling of the intoxicating liquor hereinbefore described to said Timothy Hickey, for the reason that h , the defendant, was the lawful owner, holder, and possessor, in the State of Iowa, of said property, to wit, said one glass of intoxicating
35 liquor, sold as aforesaid to said Hickey, prior to the day on which the law was passed under which these proceedings are instituted and prosecuted, known as the act for the suppression of

intemperance, and being chapter sixty-four (64) of the revision of 1860; and that, prior to the passage of said act for the suppression of intemperance, he was a citizen of the United States and of the State of Iowa."

5th. The said supreme court of Iowa erred in affirming the judgment rendered by said circuit court against the defendant.

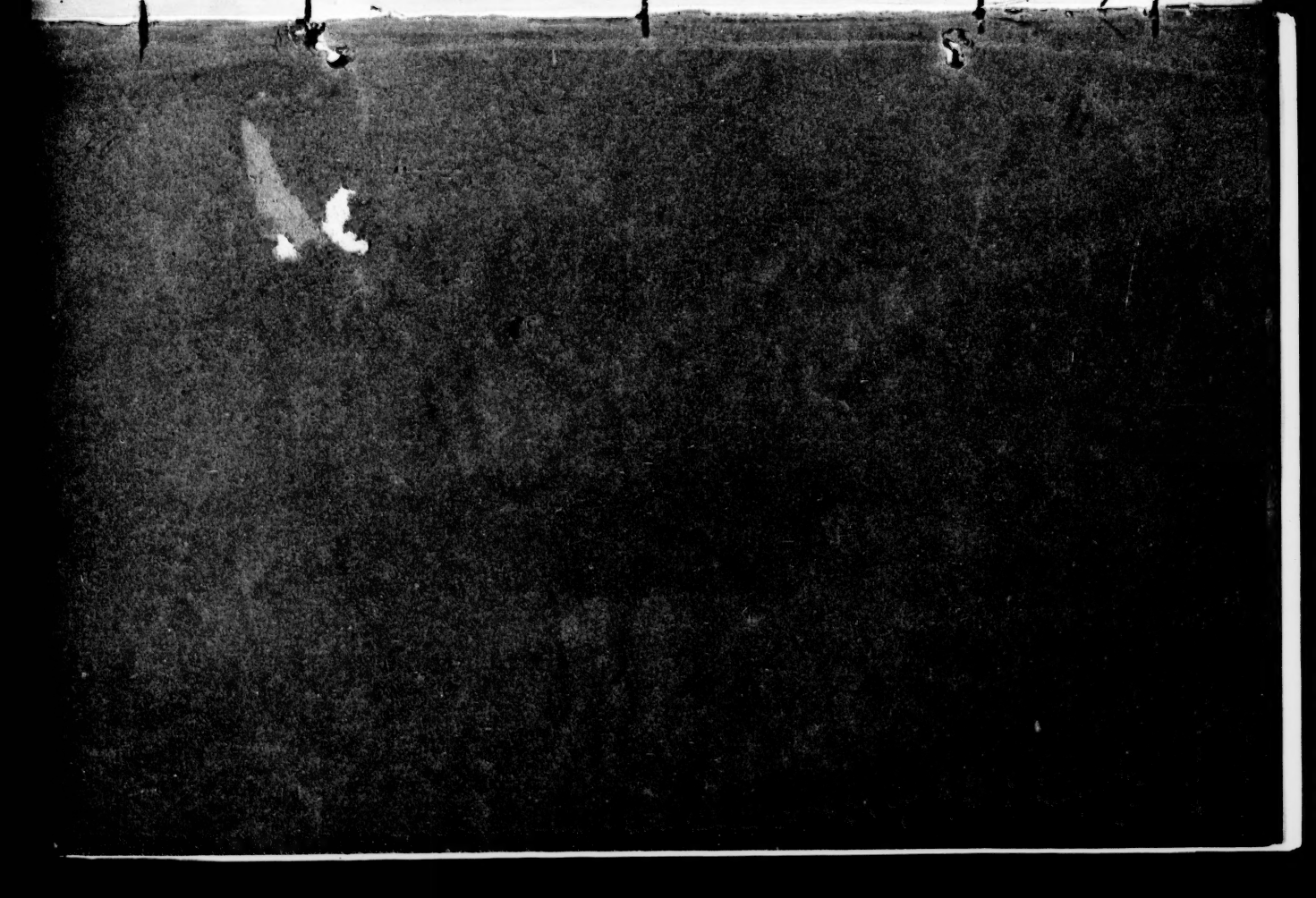
6th. The said supreme court of Iowa erred, because the act of the legislature of the State of Iowa, with the amendments thereto, entitled "An act for the suppression of intemperance," being chapter sixty-four (64) of the revision of 1860, is opposed to the common weal of the United States, and in conflict with and in violation of the Constitution and laws of the United States.

Whereupon the said F. Bartemeyer, s'r, prays that the judgment aforesaid may be reversed, annulled, and held for naught; and that he may be restored to all things which he has lost by reason of said judgment.

WM T. DITTOE,
Att'y for Plaintiff in Error.

36 (Indorsed:) F. Bartemeyer, s'r, plaintiff in error, v. The State of Iowa, defendant in error. Assignment of errors.

(Indorsement on cover:) No. 390. F. Bartemeyer, s'r, plaintiff in error, vs. The State of Iowa. Iowa sup. court. Filed 29th May, 1872.



Supreme Court of the United States

F. BARTEMEYER, Sr., Plaintiff in Error,
vs.
THE STATE OF IOWA, Defendant in Error.

In Error to the Supreme Court of the State of Iowa.

BRIEF OF APPELLANT.

WM. T. DITTOE, for Appellant.

Davenport Democrat Print.

Supreme Court of the United States

F. BARTEMEYER, Sr., Plaintiff in Error,
vs.
THE STATE OF IOWA, Defendant in Error.

In Error to the Supreme Court of the State of Iowa.

BRIEF OF APPELLANT.

WM. T. DITTOE, for Appellant.

STATEMENT OF THE CASE.

On the 8th day of March, 1870, an information was filed before a Justice of the Peace, in Scott County, Iowa, accusing F. Bartemeyer, Sr., of the crime of selling intoxicating liquors contrary to the Statute of Iowa, known as the Prohibitory Liquor Law. Bartemeyer was arrested on said charge. On the 15th day of March defendant filed a demurrer to the information, and motion to dismiss and quash the same, on the grounds that the act of the legislature of the State of Iowa, entitled "An Act for the Suppression of Intemperance," with the amendments thereto, was opposed to the common weal of the State of Iowa, and the United States, and the constitution and laws of the United States. The demurrer and motion were sustained by the Justice, who held the law to be in conflict with the constitution

and laws of the United States. The defendant was thereupon discharged, and the State appealed to the Circuit Court of Scott County, Iowa, where the same demurrer and motion were filed, which were overruled by the Court, and the defendant was brought into Court and ordered to plead, which he did in writing on the 16th day of December, 1870, admitting the sale of the liquor as charged in the information, but alleging that he had committed no crime against the law, for the reason that he was the owner, holder and possessor, in the State of Iowa, of said intoxicating liquors so sold, at and prior to the passage of the act under which the prosecution was had, and that prior to the passage of the act he was a citizen of the State of Iowa and of the United States. (Record 15.) This was the only plea filed in the cause. Trial was had by the Court, and the Court, on the verbal motion of the State, found the defendant guilty, as charged in the information, on the admissions set out in his written plea, there having been no other evidence given or received on the trial of the cause. On the 17th day of December, 1870, the defendant filed a motion in arrest of judgment, setting up the same constitutional objections to the law that were urged in the demurrer and motion; also the additional grounds, "That there is no crime charged in the information known to the law." "That the Court erred in finding the defendant guilty upon his written plea." "That it does not appear from the whole record in the case that a legal judgment could be pronounced by the Court against the defendant." The Court overruled the motion and passed judgment against the defendant. The defendant excepted to all the rulings of the Court, and on the 27th day of January, 1871, the defendant perfected an appeal to the Supreme Court of the State of Iowa, and that Court affirmed the decision of the Circuit Court.

The portions of the statute that are most material to the questions in the case at bar are here inserted.

SEC. 1. "No person shall manufacture or sell by himself, his clerk, steward or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided. And the keeping of in-

toxicating liquor, with the intent, on the part of the owner thereof, or any person acting under his authority by his permission, to sell the same within this State, contrary to the provisions of this act, is hereby prohibited, and the intoxicating liquors so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided." Revision of 1860, Sec. 1559.

SEC. 6. "If any person by himself, his clerk, servant or agent, shall for himself or any person else, directly or indirectly, or on any pretence, or by any device, sell, or in consideration of the purchase of any other property give to any other person any intoxicating liquor, he shall be deemed guilty of a misdemeanor, and shall pay on his first conviction of said offense, a fine of twenty dollars and the costs of prosecution, and shall stand committed ten days unless the same be sooner paid. On the second conviction for said offense he shall pay a fine of fifty dollars and the costs of prosecution, and shall stand committed thirty days, unless the same be sooner paid, and on the third and every subsequent conviction for said offense, he shall pay a fine of one hundred dollars and the costs of prosecution, and shall be imprisoned in the county jail not less than three, nor more than six months, and in default of payment of the fines and costs provided for the first and second convictions under this section the person so convicted shall not be entitled to the benefit of section 3268 of the Code (Poor Convict's Act) until he shall have been imprisoned sixty days. All clerks, servants and agents of whatsoever kind, engaged or employed in the manufacture, sale or keeping for sale in violation of this act, of any intoxicating liquor, shall be charged and convicted in the same manner as principals may be, and shall be subject to the penalties herein provided. Indictments and information for violations under this section may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged, as on separate indictments or informations, but a separate judgment must be

entered on each count on which a verdict of guilty is rendered. The second and third convictions, however, mentioned in this section shall be construed to mean convictions on separate indictments, or informations." Revision, Sec. 1562.

And Sec. 5 of the act forbids the manufacture of liquors in Iowa. Sec. 7 prohibits the owning or keeping of liquors. Sec. 8 declares buildings, &c., where liquors are manufactured, sold or kept, a nuisance. Sec. 15 forbids the maintenance of an action for the recovery of intoxicating liquors or the value thereof, and all contracts, &c., made for and on account of liquors sold in violation of the act, are declared null and void. Sec. 2, Art. 2, excludes "hotel keepers, keepers of saloons, eating houses, grocery keepers and confectioners" from the privilege of receiving a permit to buy and sell liquors for mechanical, medicinal, culinary and sacramental purposes." Sec. 7, Art. 2, forbids the importation of liquors into the State of Iowa, except under certain restrictions. Sec. 1, Art. 3, discriminates in favor of the citizens and products of the State of Iowa as against the citizens and products of other States, by providing for the "manufacture and sale of beer, cider from apples, or wine from grapes, currants, or other fruits grown in Iowa." It was claimed by the defendant in the Supreme Court of Iowa, that the provisions of the statute cited above were in conflict with the following provisions of the constitution of the United States, to-wit: Art. 1, U. S. Const, Sec. 8, "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Sec. 9, "No preference shall be given to any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." And Sec. 10, "No State shall, without the consent of Congress, lay any imposts or duties on any imports or exports, except what may be absolutely necessary for executing its inspection laws." "Pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts." And Art. XIV, Sec. 1, declares, "All persons born or naturalized

in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." And in conflict with the following laws of the United States, viz: Art. 2 of the Ordinance of 1787, the organic laws of Michigan, sec. 2; of Wisconsin, sec. 12, and of Iowa, sec. 12 and sec. 3 of the act for the admission of Iowa into the Union. The Civil Rights Bill, sec. 1, 14 stat. 27, and the acts to enforce the rights of citizens.

The defendant in this case claimed in the Court below an immunity and a right under and by virtue of the above provisions of the constitution and laws of the United States, and the decision by the highest Court of Iowa having jurisdiction of the subject, was against the right and immunity so set up, and the defendant brings the case into this Court upon a writ of error.

By reference to the opinion of the Court, (Record 24) an important oversight is perceived.

The bill of exceptions recites, "and the plaintiff, to sustain the charge set out in the information and the issues on his part, offered and read to the Court, as evidence, the written plea of said F. Bartemeyer, Sr., a copy of which is hereinafter set forth and filed in this Court; and on motion of the plaintiff, the said defendant was found guilty by the Court on said written plea." (Record 11.) In the final judgment these words appear: "On his written plea the Court finds him guilty as charged." Record 17.) And in the Judge's certificate to the bill of exceptions this very strong language is used: "And this being all the evidence given and received on the trial of said cause." (Record 17.) But the Supreme Court says: "The transcript fails to show that the admissions and averments of the plea was all the evidence." That is a manifest mistake. The points raised by the written plea of the defendant are exclusively federal, and come

within the provisions of the 14th Amendment to the Constitution of the United States, by which a State in its every capacity is expressly prohibited from depriving a citizen of liberty or property without due process of law. The authorities supporting all the constitutional objections to the law raised by the bill of exceptions are cited in the following

ARGUMENT.

I.

The act of the Legislature of the State of Iowa, entitled an "Act for the Suppression of Intemperance," is in conflict with Art. 14, Sec. 1, of the Constitution of the United States, which declares, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and also with the "Civil Rights Bill," Sec. 1, 14 Stat. 27, and the act to enforce the rights of citizens, Sec. 16, Chap. 115, U. S. Stat. 41st Congress, 2d session, 1870, 144. The first point to be determined is, what are the privileges and immunities of a citizen of the United States, the States are forbidden to abridge, by the second clause of the section above cited? It is difficult to define them all. But one may safely assume, that among the fundamental privileges protected by the fourteenth amendment, is the right to acquire, possess and dispose of real and personal property, and to follow any useful and lawful occupation—any occupation recognized directly or indirectly as lawful by the federal laws—subject only to such regulations as the State may impose, but which regulations must be reasonable and not inconsistent with constitutional restrictions, and such as are absolutely necessary for the safety and support of the State Government. Under this clause a citizen

of the United States has the undoubted right to go into any State in the Union, take such property with him as is recognized as property by the laws of the United States and the common law, and sell the same, subject only to such taxation as is necessary for the support of the Government, and no more. All trades and professions, recognized as lawful by the United States, are placed within the reach of every citizen by this amendment. Qualification, not caste, is now the rule. That the great right of liberty of pursuit, is one of the fundamental privileges of a citizen of our republic, and is one of the privileges protected by this amendment, no one will be so bold as to question. In order to get a clear idea, as to what are some of the privileges and immunities of a citizen of the United States, which cannot be abridged by the States, let us for a moment blot out of existence the several State Governments, and then inquire, what, in such event, would be the right of such citizens under the fourteenth amendment? Certainly all privileges and immunities, recognized as lawful by common law and the laws of the United States, could be freely exercised, and unquestionably the absolute rights of individuals would in such case receive ample protection. Now, if these sacred rights are thus protected, and can be enjoyed, then all State laws that abridge, or in any manner curtail or interfere with their full and complete enjoyment, are null and void. On this question Justice Bradley, of the Supreme Court of the United States, in the Live Stock Dealers' and Butchers' Association, of New Orleans, *et al.*, *vs.* The Crescent City Live Stock Landing and Slaughter House Company, *et al.*, No. 3, Chicago Legal News, Vol. 3, 17, says. "The 'privileges and immunities' secured by the original Constitution, were only such as each State gave to its own citizens, each was prohibited from discriminating in favor of its own citizens, and against the citizens of other States. But the fourteenth amendment prohibits any State from abridging the privileges and immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges, *but it demands that the privileges and immuni-*

ties of all citizens shall be absolutely unabridged and unimpaired."

If the above construction be true, and there is no reason why it is not, can we imagine a more flagrant violation of the fundamental privileges and immunities of an American citizen, than is perpetrated by the act in question? It says, in substance, that no person shall manufacture, sell, or keep, with intent to sell, intoxicating liquors within the State of Iowa, except for mechanical, medicinal, culinary or sacramental purposes, and if such liquors are manufactured, sold, or kept with intent to sell, contrary to this act, or kept in any place except a dwelling house, they are declared a nuisance and forfeited ; it prevents a citizen of the United States, whose business it is in a sister State to manufacture or sell liquors, from coming to Iowa to follow either of such occupations ; Sec. 1, Art. 3, forbids the manufacture and sale of wine, in the State of Iowa, from grapes or currants grown in another State ; and Sec. 2, Art. 2, excludes "hotel keepers, keepers of saloons, eating houses, grocery keepers and confectioners," from the privilege of receiving a permit to buy and sell intoxicating liquors for "mechanical, medicinal, culinary and sacramental purposes only." Not satisfied with the stringent prohibitory measures of the first section of the statute, Sec. 2, Art. 2, brands a very large and respectable number of our citizens, as unworthy the confidence and trust of the State, not on account of any incompetency or bad character, but because of the occupations they have chosen to follow. Why proscribe persons who are engaged in a business now and always considered useful and honorable ? Is the vending of liquors for the above named mechanical and other purposes of such a high character that an honest dealer in tea, sugar, coffee and spices, or sweetmeats, can never hope to reach it? Can or will a law contemplating such depredations upon the privileges and the immunities of citizens of the United States, be sustained by the supreme judicial tribunal of the country ? In other words, is it possible for that high tribunal of justice, to construe the above constitutional clause to mean that a citizen of the United States has the right in the

State of Illinois to manufacture, sell, and keep with the intent to sell, intoxicating liquors, and to institute and maintain an action for the recovery or possession of intoxicating liquors, or the value thereof, and then step over into the State of Iowa and hold a contrary doctrine, because the latter State prohibits the exercise of those fundamental rights?

It may be claimed that the fourteenth amendment only applies to the negro and others born in this country, who were, under the original constitution, deprived of political privileges. Judge Bradley, in the case above cited, on this point, says: "It is possible that those who framed the article (14th amendment) were not themselves aware of the far-reaching character of its terms. They may have had in mind but one particular phase of social and political wrong, which they desired to redress. Yet, if the amendment, as framed and expressed, does, in fact, bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach such social evils which were never before prohibited by constitutional enactment, it is to be presumed that the American people, in giving it their impermatur, understood what they were doing, and meant to decree what in fact, has been done."

The Court is referred to the slaughter house case above cited. U. S. *vs.* Hall, *et al*, Chicago Legal News, Vol. 3, 261. 4 Wash. C. C. R., 380.

II.

It is repugnant to the Constitution and laws of the United States, because it deprives a person of liberty and property, without due process of law.

Article II of the Ordinance of 1787 provides, "that no man shall be deprived of his liberty or property, but by the judgment of his peers or the laws of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property—full compensation shall be made for the same." This provision of the Ordinance of 1787 was incorpora-

ted in the organic laws of Michigan, Sec. 2, of Wisconsin, Sec. 12, and of Iowa, Sec. 12, and the Bill of Rights of the Constitution of the State of Iowa, Art. 1, Sec. 1, provides, "That all men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property." Sec. 9 declares: "No person shall be deprived of life, liberty, or property without due process of law." Sec. 18 declares, "Private property shall not be taken for public use without just compensation first being made or secured, to be made to the owner thereof," and Sec. 25 declares, "The enumeration of rights shall not be construed to impair or deny others, retained by the people." And notwithstanding all these safeguards thrown around the absolute rights of individuals, the people were yet fearful the legislative power of the State might yet deprive them of some or all of those sacred rights, and ever jealous of their rights, they, in the majesty of their power, declared by the fourteenth amendment to the Constitution of the United States, that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law." Sec. 1, Art. 1, of the act under consideration declares, in substance, that no person shall manufacture, sell, or keep with intent to sell, any intoxicating liquors contrary to the provisions of the act, and declares all such liquors a nuisance, and that they shall be forfeited. The sole object of the law is prohibition, (It was so held in Geebrick *vs.* State, 5 Iowa 495,) the destruction of property in liquors, yet the Constitution says, that all men shall have the right of acquiring, possessing and protecting property, and that they shall not be deprived of it "without due process of law." "Due process of law" may be defined to be, that no person shall be deprived of the rights of person or property without a regular trial, in a court of justice, according to the course and usages of the common law. It follows that the legislative power of a State cannot, in the face of the constitutional clauses above quoted, enact a law depriving a man of his

liberty or property, that conflicts with the common law as it existed at the time of the adoption of the Constitution. Were it otherwise—had the people intended to confer this power on the Government, they certainly would not have been so careful in restricting its powers in the Constitution. Certainly no one would be so bold as to claim that the Legislature of Iowa had such power prior to the adoption of the Constitution, or that the common law gives it such immense power. The common law has never been abolished.

The first Continental Congress declared, in 1774, by solemn enactment, "that the inhabitants of the colonies were entitled to all the rights, privileges and immunities of natural born subjects of Great Britain, and entitled to the common law of England." (Kent, 10 ed., 1 vol., 615.)

The courts of Iowa have declared the common law to be in force in Iowa.—(O'Farral vs. Simplat, 4 Iowa, 381; The State vs. Twogood, 7 Iowa, 252.

That the common law is the birthright of American citizens no one will presume to deny—at least that portion of it engrafted in the constitutions. And all rights protected and deemed sacred by the common law cannot be taken from the people without their express consent. It therefore follows that to deprive a person of any one of his common law rights—rights which existed prior to the adoption of the Constitution, and which are not taken away by that instrument—it must be done in accordance with the rules of common law as established when the Constitution was adopted.

That part of the common law relating to the absolute rights of individuals has been engrafted in the laws and clauses of the Constitution above quoted, and I am wholly unable to discover the source whence the Government of Iowa got its authority to enact a law, which, in defiance of all rules of common law, as well as the fundamental rules of the Constitutions, and declares a certain class of property a nuisance, and that it shall be forfeited. The Supreme Court in "The State *Ex rel.* Pitman, *et al, vs.* Adams *et al.*, 44 Mo. 585, says, "But an act declaring a forfeiture, if

outside of legislative authority, cannot be strengthened by reciting facts that might judicially work a forfeiture, unless those facts are judicially passed upon. The question of forfeiture is strictly judicial, and the Legislature cannot constitutionally know either that the facts exist or their legal effect. It would be absurd to hold that we are bound by a recital of facts which the Legislature had no right to find, and by an assumption of their effects, which it had no right to declare." In a limited government like ours the power of forfeiture can only be exercised in the mode prescribed by the Constitution, and when the Constitution fails to furnish a rule, then the common law steps in and furnishes one. State vs. Snow, 3 R. I., 71.

Section 7, Art. 1, provides that "proof of finding the liquor named in the indictment, or information in possession of the accused in any place except in his private dwelling house, or its dependencies, (or in such dwelling house or dependencies, if the same be a tavern, public eating house, grocery, or any other place of public resort,) shall be received and acted upon by the Court as presumptive evidence that such liquor was kept or held for sale contrary to the provisions of this act." Hence if the accused cannot establish by proof *aliunde*, for he is charged with a crime, and his mouth is closed, that the liquors if found outside of his dwelling house, were not kept or held for sale contrary to the provisions of the act, he is, although innocent, and by force of this law, must be found guilty and fined accordingly by the Court. This is not all; the next section follows by declaring, "In case of a violation of any of the provisions of either of the three preceding sections, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping with intent to sell, of any intoxicating liquor is carried on or continued, or exists, is hereby declared a nuisance, and may be abated as the law provides." Thus it is seen if a man be found guilty under sections 5, 6 or 7, he can make no defense, if any officer of the law wishes to abate the property in which the liquors were found. Is this not depriving a person of his liberty and property "without due process of law?"

Do not these two sections reverse that ancient and humane rule of common law, by presuming a man guilty, instead of his innocence? How can the Legislature reverse that wholesome rule, when the Constitution, the source of all its power forbids it? Does not the act destroy absolute rights? The absolute rights of individuals are higher than the Constitution, and in construing a statute that encroaches upon, or deprives a person of any of those sacred rights, every doubt should be resolved by the Court in favor of the absolute right. The power over these rights has never been surrendered by the people; on the contrary, they have doubly fortified them by prohibiting the State and the United States from in any manner whatever touching them.

The only evidence, in the case at bar, of the defendant's guilt, is his written plea, which establishes the fact that the intoxicating liquor, alleged in the information to have been sold by defendant, was owned and possessed by him prior to the passage of this law, and that defendant was at that time and is a citizen of the United States. On this evidence the defendant was found guilty by the Court and fined accordingly. The Court of Appeals of New York, in Wynehamer *vs.* the people, 3 Ker, 486, says, 1st. "That the prohibitory act, in its operation on property in intoxicating liquors existing in the hands of any person within this State when the act took effect, is a violation of the provision in the Constitution of this State, which declares that no person shall be "deprived of life, liberty or property, without due process of law." 2d. "That inasmuch as the act does not discriminate between such liquors existing when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant a defense based upon the distinction referred to, it cannot be sustained in respect to such liquors, whether existing at the time the act took effect, or acquired subsequently." The above principles of law have never been questioned. The act of New York contained the same provision as the one under consideration. This act unquestionably deprives a man of his liberty and property "without due process of law." If the Legislature has the power to

enact a law declaring a class of property, always recognized by law as property, a nuisance, and forfeited, and forbid its manufacture and sale, what security have we for our vested rights in property? A vested right in property cannot be taken away or destroyed by a legislative enactment, or by any power without compensation "first being made or secured to be made to the owner." If it could be, we would hold our property subject alone to the vacillating will of the Legislature. A person might one day be the fortunate possessor of a large amount of valuable property, and the next day the Legislature may step in and declare that his property is injurious to society; that it is a nuisance and must be forfeited for the good of the commonwealth. Thus, if we concede this power, by the simple act of the Legislature, the acquisitions of a lifetime are swept out of existence, and the owner is remediless. If the Legislature has this uncontrolled power over the lives, liberty and property of individuals, and surely it has assumed it, by the passage of this act, it possesses despotic authority, and may use it at will. Our rights would no longer be safe. We would not be republicans, but slaves. On this point Justice Story, in Wilkins *vs.* Leland, 2, Peters, 657, says, "That Government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention." If such authority is possessed hy the State, what is to prevent an anti-coffee and tea-drinking Legislature from enacting a similar law in relation to those articles of property. If it has the power

in relation to liquors, it has it in relation to coffee and tea, which are, by eminent medical authority, deemed very injurious to health—the primary cause of many fatal diseases. The State can know no distinction between different kinds of personal property. Its characteristics of individuality are alike in all cases. Hence the power of the Legislature to enact a law destroying property must be general and not special. If it has no such general powers, it can have no special power over a particular class of property. And when the Constitution declares that all men shall have the right of acquiring, possessing and protecting property, and that no person shall be deprived of his property without due process of law, it makes no distinctions as to any particular class of property, for all classes are held sacred in the eyes of the Constitution, and all speculations, as to the scientific and chemical properties of any class of property, can have nothing whatever to do with it. If the Constitution protects property, it protects all kinds alike, and the Legislature cannot take away the right to own, enjoy and protect it. Liquor was held to be property in the State of Iowa *vs.* May, 20 Iowa, 308.

It is plain that by the operation of this law the commercial qualities of intoxicating liquors are totally destroyed. It is unlawful to own, sell or keep it with intent to sell. It is declared a nuisance, and the protection of the law is withdrawn from it. Property is valueless unless it can be owned, sold and enjoyed. It is in fact useless for commercial purposes. It is true the law permits the sale of liquor for mechanical, medicinal, culinary and sacramental purposes, but these are only incidental uses of the article. Sales cannot under any circumstances be lawfully made in contemplation of any general purposes. It is a wholesale scheme for the destruction of property in liquors in the State of Iowa. It annihilates its value and strips it of all its attributes of property, and evidently conflicts with the provisions of the Constitutions above quoted. The law, so far as it effects property in existence at the time it took effect, is subversive of the first principle of justice. It is more like the edict of a despot than a law enacted by a constitutional Legislature of a free people. It

exerts, assumes and exercises powers inconsistent with the fundamental principles which underlie our republic. It changes innocence to guilt. It makes an act criminal which, when done was lawful, by punishing a person for having his liquor remain in his grocery store, where he had placed it before the law took effect. Hence, so far as the act effects property owned before the law took effect, it does unquestionably "deprive a person of his property without due process of law," for the moment it took effect all vested rights in such property were destroyed, and all that was required to be done by the officers of the law, was to carry into effect the decree of forfeiture already pronounced by the Legislature.

We have already seen that this law declares all intoxicating liquor manufactured, sold, or kept for sale, in violation of the act, a nuisance, and that they shall be forfeited. This, it is claimed, is done in self defense—by virtue of the police power. If the State has, under the guise of the police power, the authority to declare a certain class of property a nuisance, has it less the authority to withdraw its protection from any other class of property? I have no doubt but that a State may, under the authority of the police power, prevent the introduction of any thing that has the ingredients within itself that may corrupt the morals or endanger the health or lives of the citizens; but in all cases the thing must of itself work the corruption or endanger the health of the community; that is, the danger must be immediate. Nothing can be anticipated. Putrid meats, infected goods, or pernicious publications come within the perview of this power, and the use of either of those articles is dangerous. The danger does not, as in the case of intoxicating liquors, depend altogether on their abuse. They cannot be used under any circumstances without injurious effects follow, and liquors can and are used beneficially. The act of a Legislature declaring a certain class of property unsound and injurious to the morals and health of the community, does not make it so, and the police power will not shield the act from condemnation by the Court. The State may, under this power, prevent the immigration of paupers, vag-

abonds and fugitives from justice, but that does not justify the exclusion of persons who are not vagabonds, paupers or fugitives from justice. The police power is the right of self preservation. The State possesses the same rights of self-preservation that are held by an individual, and can do all and no more than an individual can do in self-defense. An individual possesses the same right that a State does, to declare an article a nuisance. But neither can declare an article a nuisance that is not one in itself, and each must assume the responsibility of mistakes. It is true, this class of property is sometimes abused by some of the human family. But are there not many other classes of property that are subjects of abuse by man? There is nothing that we eat or drink but that is more or less perverted to some bad end by many of our race. Wheat, corn and rye may be and are used in the manufacture of intoxicating liquor. If intoxicating liquors are dangerous to the health and morals of the citizens, are not wheat, corn and rye, which are the original source of a large class of intoxicating liquors, also dangerous? Why not prohibit the importation, production and sale of those articles? The power is as ample in the one case as it is in the other. But there is a limit to the police power. If there were not, we would be left wholly at the mercy of the vacillating whims of the Legislature. Where is that limitation? It is found in the Constitution of our country, which provides that a citizen of the United States shall not be deprived of his "life, liberty or property, without due process of law." The police power can only be used in cases of the most urgent necessity. It is cases of overruling necessity that alone legalizes that power. It can be resorted to only for the general safety and support of society, and can in no case conflict with the Constitution. It is intended to protect and not destroy rights guaranteed by that instrument. The Constitution protects all our absolute rights equally alike. The right to acquire, possess and dispose of property is as sacred, in the eye of the Constitution, as the right to enjoy life and liberty. So is the right to enjoy liberty as sacred as the right to enjoy life. It is as much the duty of the government to protect the one as the

other ; and the Legislature is bound, by all the sacred obligations that bind society together, to protect and to secure the unqualified enjoyment of all those rights. It cannot abolish or abridge one to advance the interest of the others. The Legislature can no more do that than it can abolish the Constitution itself. Neither right can be made to yield to the other. Could the legislature do this our written Constitutions are a complete failure, and a law which declares the exercise of one of the fundamental rights, protected by the Constitution, a crime, infringes the express rule of our system of government, and is not within the general powers of the Leeislature over crimes.

Intoxicating liquor is not a nuisance in itself. It does not possess a single element of a nuisance about it. If analyzed it will be found to be perfectly free from the least impurity, and the State cannot by enactment make it a nuisance. It is hard to understand how the State can by statute declare an article under certain circumstances divested of all the qualities of property, and under others invest the same property with all the safeguards of the law. The State cannot make that distinction, and a law that does is not uniform in its operation. It must apply to all liquors alike, unless there is something in the liquor itself that makes the distinction. The change of ownership or location cannot do that. On this point the Court, in Preston vs. Drew, 43 Maine, 562, says, "It would be not a little absurd to declare that to be a nuisance, and as such liable to be abated and destroyed, which the act allows to be sold and purchased as an article useful for medicinal and mechanical purposes."

In Wynehamer vs. the People, 3 Ker., 454, Hubbard, J, says, "It is not pretended, nor can it be, that property which is not *per se* a nuisance can be annihilated by force of a statute alone or by proceeding *in rem* for the punishment of a personal offense. Liquor is not a nuisance *per se*, nor can it be made one by a simple legislative declaration. It does not stand in the category of common nuisances which of themselves endanger the welfare and safety of society." A nuisance is anything that works of itself some inconvenience to the public or some private individual, and

the declaration that all intoxicating liquors, manufactured, sold, or kept with intent to sell contrary to this act, is a nuisance, is an assumption not warranted by the Constitution. It is an absolute destruction of property in liquors, for no man can lawfully sell a nuisance to his neighbor, hence its salable qualities are ruined. No one will deny but that intoxicating liquors, prior to the passage of this law, were invested with all the attributes of property by the common law, and that they are now and always have been recognized as property by the common law, by the laws of the United States and of the commercial world. If this be true, and it certainly is, how can the Legislature, by statute, declare that article of property a nuisance, which does not possess a single ingredient of a nuisance about it, and thus authorize and legalize its destruction. Whether a thing is a nuisance, is a judicial and not a legislative question, and can only be ascertained by the rules of common law. But this law assumes the powers of the judiciary, and decides the question without trial, and leaves to the judicial tribunals the very pleasant task of carrying the judgment already passed by the legislature into execution. We claim that the Legislature of the State of Iowa has no power, either expressed or implied, to declare an article of property a nuisance. That is a matter entirely within the power of the courts, and even a court cannot pronounce an article of property a nuisance, that would not under the same circumstances be a nuisance any and every where in the United States. The rule applicable in such case must of necessity be universal, or the safeguards thrown around our property would be of no avail. If the right of property consists in its "free use, enjoyment and disposal," there can be no property, in the legal sense of the term, in the thing, unless the owner can use, enjoy and sell the same, for that which cannot be used, enjoyed and sold, is not property, and a statute that takes away any or all of these rights, deprives the owner thereof "without due process of law." The mere intent in a person's mind cannot be deemed the act of his property, nor can it be deemed a nuisance, and such intent will not work a forfeiture of his property at common law. The Le Tigre

3 Wash., C. C., 567 and 572; Fisher vs. McGirr, 1 Gray, 22. In Rex vs. Wharton, 12 Mod. 510, Holt, C. J., says, "if one see a neighbor erecting a thing which will become a nuisance, he cannot abate it until it becomes an actual nuisance." It is a well established rule of law, that an act justified by a lawful and competent authority cannot be made the foundation of an action, either civil or criminal, and how Sec. 7, Art. 1, which makes it a misdemeaner to have liquors remain in a store-room, where they had been lawfully placed, before the law took effect, can be sustained, is more than I can comprehend.

Opinions of Comstock, J.. 382, A. S. Johnson, J., 416 to 425, Selden, J., 428, Hubbard, J., 453 to 456, and Denio, C. J.. 459, and cases therein cited, in Wynehamer vs. The People, 3 Ker. Opinion of Senator Sherman in Russell vs. Mayor of New York, 2 Den., 461; Taylor vs. Porter, 4 Hill, 145–6; Sacket vs. Andros, 5 Aill, 358–9; Hoke vs. Henderson, 4 Dev., 1; Green vs. Biddle, 8, W., 175; Green vs. Briggs, 1 Curtis, 311 and 325, Ex parti Milligan, 4 Wal., 4; Westervelt vs. Gregg. 12 N. Y., 209; Cummings vs. State, 4 Wal.. 320. 321, 325 and 326; Ex parti Garland, Ibid, 333; Craig *et al. vs.* Kline, *et al*, 65 Penn., 412 and 413.

III.

This law is repugnant to Art. 1, Sec. 8, of the Constitution of the United States, which declares, "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with Indian tribes." Sec. 9 declares, "No preference shall be given to any regulation of commerce or revenue to the port of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another; and Sec. 10 declares that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Sec. 8, above quoted, undoubtedly confers upon Congress the exclusive control over

commerce among the States. If there is any doubt as to the extent of power conferred upon Congress by Sec. 8, certainly Secs. 9 and 10 must remove it. Sec. 9 requires uniformity in regulations of commerce among the States, which could not prevail if the States possessed concurrent power with Congress over commerce, and it declares the State shall not pass any law requiring vessels to enter, clear or pay duties in another; and Sec. 10 absolutely forbids the State to lay any imposts or duties on imports or exports without the consent of Congress, except what may be absolutely necessary for executing the inspection laws of the State. Thus it seems clear that a State cannot possess concurrent power with Congress over inter-state commerce; if it did, it would not require the consent of Congress before it could make a regulation of commerce. It will not be claimed that the statute under consideration is a law for the inspection of imports or exports. If it is not an inspection law, then, it having in view the prevention of the importation of liquors, is a regulation of commerce, and to make it a valid law, the consent of Congress was necessary, and it will not be claimed the State has ever obtained such consent. It follows, that if the State does not possess concurrent power over inter-state commerce with Congress, that Congress possesses exclusive control over the same. The Supreme Court of Iowa, in Santo, *et al*, *vs.* The State of Iowa, 2 Iowa, 202, uses this language. "In Gibbons vs. Ogden, 9 Wheat., 1, it was held that the power to regulate commerce between the States, given to Congress by the Constitution, was not *exclusive* in Congress until exercised—nor, perhaps, until there was a collision between regulations made by Congress and by a State. And the same view was taken in Wilson *vs.* Blackbird Creek, Marsh Co., 2 Pet., 251." In order to ascertain what was held by the Court in the cases above cited, let us take the cases themselves, and then the opinions of the several learned Judges of the Supreme Court of the United States and other Courts. Marshall, C. J., in Gibbons vs. Ogden, 9 W., 194, says, "The subject to which the power is next applied, is to commerce 'among the States.' The word 'among' means intermin-

gled with. A thing which is, among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior." Again, 196, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." "If, as has always been understood, the sovereignity of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Again, 227, "The power of a sovereign State over commerce, therefore amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits of its freedom necessarily implies the power to determine what shall remain unrestrained, *it follows that the power must be exclusive ; it can reside in but one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.*"

And lastly, 228, the learned Chief Justice remarks, "The power to regulate foreign commerce is given in the same words and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive." And in commenting upon the second clause of Sec. 10, Art. 1, at 236, he observes, "Not satisfied with the exp ess grant to the United States of the power over commerce, this clause negatives the exercise of that power to the States, as to the only two objects which could ever tempt them to assume the exercise of that power, to-wit : the collection of revenue from imposts and duties on imports and exports ; or from tonnage duty."

In Brown vs. The State of Maryland, 12 Wheat, 436, it was decided by the Court that a statute of a State was invalid that imposed a tax on foreign imported goods, and at 449, that emi-

nent jurist, Chief Justice Marshall, who delivered the opinion, remarked, "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State." And at 446 the Court says, "It is not, therefore, a matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States."

In the Passenger case, 7 H., 400, Justice McLean, who delivered the opinion of the Court, says, "Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this Court in the case of Gibbons vs. Ogden, 9 W., 1, reiterated in Brown vs. The State of Maryland, 12 W., 419, and often re-asserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion that the power to regulate commerce with foreign nations and among the several States, by the Constitution, is exclusively vested in Congress."

In the same cases, at 411, Justice Wayne says, "That a majority of us do not think it necessary in these cases to re-affirm, with our brother McLean, what this Court has long since decided, that the constitutional power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, is exclusively vested in Congress, and no part of it can be exercised by a State. I believe it to be so, just as it is expressed in the preceding sentence."

In commenting upon the case of Wilson vs. The Blackbird Creek, Marsh Co., 2 Pet., 250, Justice McLean, in passenger cases, 7 H., 338, says, "To suppose that he intended to lay down the general proposition that a State might pass any act to obstruct or regulate commerce which did not come in conflict with an act of Congress, would not only be unauthorized by the language used, and the facts of the case before the Court, but it would contradict the language of the Court in Gibbons vs. Ogden, Brown vs, Maryland, and every case in which the commercial power has been considered."

As to the case of New York vs. Miln, 11 Pet., 102, Justice

Wayne, who took part in the decision, says, in 7 H., 429 to 433, that case, as reported, is erroneous; that four of the Judges were of the opinion that the power in Congress to regulate commerce was exclusive, and the remaining three thought otherwise.

Justice Baldwin, in the case of Groves vs. Slaughter, 15 Pet., 511, says, "That the power of Congress to regulate commerce among the several States is exclusive of any interference by the States, has been, in my opinion, conclusively settled by the solemn opinions of this Court, in Gibbons vs. Ogden, 9 Wheat, 186–222, and in Brown vs. Maryland, 12 Wheat, 438–446.

In Bark Chuson, 2 Story, C. C. R., 464 and 465, the Court says, "Perhaps it will be suggested that if Congress had passed an act upon this subject it would be paramount authority, and suspend or control State legislation upon the same subject; and until Congress shall pass such act the States have full authority to act upon it. *This I utterly deny.* If the power to regulate foreign or inter-state commerce be, as I conceive it to be, exclusive in Congress, all state interference therewith is unconstitutional and void. Congress having power to regulate the whole subject, regulates it as much by what it leaves without any regulation, as by what it expressly provides for. The will of Congress is equally expressed in both cases. It cannot be said that a State has a right to step in, and by way of complement, fill up by its own legislation what is not actually occupied by that of Congress. Such was the doctrine maintained by the Supreme Court in Hudson vs. Moore, 5 W., 1—21 and 22; Gibbons vs. Ogden, 9 W., 1—196 to 122, and Holmes vs. Jennison, 14 Pet., 540, 574 to 579."

And in a still later case decided by the Supreme Court of the United States, viz: Hinson vs. Lot, 8 Wal., 151, says, "That Court seems to have relieved itself of the objection by holding that the tax imposed by the State of Alabama was an exercise of the concurrent right of regulating commerce remaining with the States until some regulations on the subject had been made by Congress. But assuming the tax to be, as we have supposed, a

discriminating tax, levied exclusively upon the products of sister States; and looking to the consequences which the exercise of this power may produce, if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the States, under the cloak of the taxing power, *we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever.*" "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation, and be forbidden by the clause of the Constitution just mentioned."

In Holmes vs. Jennison, 14 Pet., 574, Taney, C. J., when speaking in relation to concurrent power, uses this language, "But when an authority is granted to the Union, to which a similar authority in a State would be absolutely and totally contradictory and repugnant, then the authority to the federal government is necessarily exclusive, and the same power cannot be exercised by the State."

And in Sturges vs. Crawenshield, 4 Wheat, 193, Marshall, C. J., remarks on the same subject, "Whenever the terms in which a power is granted to Congress, or the nature of the power require that it should be exercised exclusiveiy by Congress, the subject is as exclusively taken from the State Legislatures as if they had been forbidden to act."

In relation to the License Cases, 5 H., 504, upon which decision the Supreme Court of Iowa, in Santo, *et al*, *vs.* The State, laid much stress, and in fact bases its opinion. (It must not be forgotten that the laws, the constitutionality of which was tested in those cases, were license laws. The question of prohibition was not before the Court.) It may be well to remark that the same Judges who decided that case also decided the Passenger cases, 7 H., 283. As we have already seen in those cases, the majority of the Court, viz: Judges McLean, Catron, McKinley,

Grier and Wayne, held the power of Congress over commerce among the States to be exclusive, and the Supreme Court in Woodruff vs. Parham, 8 Wol., 139, remarked in relation to the License Cases, "The separate and diverse opinions delivered by the Judges on that occasion leave it very doubtful if any material proposition was decided, though the precise point we have argued was before the Court, and seemed to require solution."

The cases above cited establish unquestionably, at least, two points—

1st. That Congress possesses exclusive power over the commerce among the States, and that the States can exercise no part thereof, even though Congress has not acted upon the subject; and,

2nd. That the decisions in the License Cases, 5 H., 504, and Wilson vs. Blackbird Creek, Marsh Co., 2 Pet., 251, so far as they refer to the power of Congress over the commerce among the States, were overruled in the Passenger cases, 7 H., 283.

From the language used by the Supreme Court of Iowa, in Santo, *et al*, *vs.* the State, 2 Iowa, 202, above quoted, it is safe to conclude, that that Court would have rendered a contrary decision, had it been convinced,—

1st. That Congress possessed exclusive power over commerce among the States, and that the States cannot exercise any part thereof, even though Congress has failed to legislate upon the subject; or,

2d. That Congress had legislated upon the subject, and that there was a collision between the regulations of commerce made by Congress and those made by the State of Iowa.

That the law under consideration is a regulation of commerce no one will stop to question. It prohibits the sale of all intoxicating liquors, excepting foreign importations, for general purposes, and in the language of Taney, C. J., in the License Cases, 5 H., 378, it "acts directly upon an import from one State to another, while in the hand of the importer for sale, and is therefore a regulation of commerce acting upon the article while it is

within the admitted jurisdiction of the General Government, and subject to its control and regulation."

The next question to answer, is, has Congress legislated upon the subject of commerce, and do those regulations made by Congress conflict with the statute under consideration? It having been already established that the statute of Iowa for the suppression of intemperance, is a regulation of commerce, what has Congress done on that subject? It has enacted laws regulating the "construction and equipment of steamboats," and for "the security of the lives of passengers on steamboats, upon bays, lakes and rivers of the United States." Acts approved March 3, 1843, 5 Stat., 626, and August 30, 1852, 10 Stat., 61. It has enacted, in the act for the admission of Iowa into the Union, approved March 3, 1845, Rev. Iowa of 1860, 965, Sec. 3, as follows: "and that the said river Mississippi, and the navigable waters leading into the same, shall be common highways, and forever free as well as to the inhabitants of said State, as to all other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the State of Iowa." Thus it appears that Congress has not only enacted laws regulating commerce among the States so far as it thought proper, but it has positively prohibited the State of Iowa in said "act of admission" from enacting any laws for the regulation of commerce on the Mississippi river, by declaring that river and all navigable waters leading into it, public highways and forever free to all citizens of the United States of any tax, duty, impost or toll, imposed by the State of Iowa. If the State of Iowa cannot regulate commerce carried on the Mississippi, it certainly cannot regulate that carried on land. One would be inconsistent with the other. It would be more than folly for the State to permit the importation and sale of property carried into the State by steamboats, which it is bound to do under the act of admission, and prohibit the importation and sale of property carried into the State by railroads. There is no difference between prohibiting the sale of an import and a tax high enough to effect a prohibition. Either would be a regulation of commerce, and comes within the prohibitions of the act for the "admission of Iowa."

It having been established that the act is a regulation of commerce, and involves a principle which necessarily leads to actual commercial non-intercourse, and that Congress has exclusive power over commerce among the States, and that States can exercise no part thereof; that Congress has legislated upon the subject so far as it thought proper, and that there is a collision between the regulations of ~~Congress~~ commerce made by Congress and those made by the State of Iowa, the act is in conflict with the provision of the Constitution and the laws of the United States above quoted. But it is claimed that a State Legislature, under the authority of the police power of a State, may counteract the commercial power of Congress. I deny the proposition. The police power cannot give the State power to prevent the importation of any article of property that belongs to foreign or inter-state commerce, which is so recognized by the United States Government. For if a State possesses the authority, under the police power, to declare what shall and what shall not be lawful inter-state or foreign commerce, or what article of property shall belong to commerce, as it does in this law. Then a State may control the commercial power of Congress, and the Federal Government would be utterly helpless and at the mercy of the States. For a State may, in its discretion, prevent the introduction of any class of property within its borders, it wishes. All it has to do, is to declare, by legislative enactment, that a certain class of property is injurious to the health and morals of community, and that it is a nuisance, and shall not be imported, sold, or kept for sale, and it is done, and the powers of Congress are set aside.

On this question, hear Chief Justice Taney in the Licence Cases, 5 H., 583. He says, "And when the validity of a State law, in making a regulation of commerce, is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the Legislature, nor can a Court inquire whether it was intended to guard the citizens of a State from pestilence and disease, or to make regulations of commerce for the interests and

convenience of trade. Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power."

It is claimed that the statute of Iowa for the suppression of intemperance is a police regulation. If it was such a regulation as operated solely upon the internal affairs of the State, and did not absolutely forbid the sale of a certain class of property, it would come within the police power, but does it more than that; it forbids the sale and the keeping for sale of intoxicating liquors, whether they are manufactured in this or imported from another State, and is therefore a regulation of commerce, and hence null and void.

Now, if intoxicating liquor does not belong to commerce—that is, if it has no commercial qualities, then the State may possess the right, under the police power, if not to prevent, to at least regulate its introduction and sale; but if it is an article of commerce—that is, if it is recognized as such, and as such regulated and taxed by the United States Government, it is exclusively under the absolute control of Congress, and a State cannot act upon it in any manner whatever until it becomes commingled with the property of the State, then a State may tax the same or require a license before it can be sold, but it cannot be taxed higher than any other property of the same value. For the commercial power of Congress and the police power of the States must, to give both force and effect, exist independent of each other. "That is to say," to use the language of Justice Carton, in the License Cases, 5 H., 600, "that which does not belong to commerce is within the jurisdiction of the police power of the State, and that which does belong to commerce, is within the jurisdiction of the United States."

Again, at 608, he says, "For the sake of convenience, the views on which this opinion proceeds, will be briefly stated."

"1st. It is maintained that spirits and wines are articles belonging to foreign commerce and commerce among the States; and that Congress can regulate their introduction and transmis-

sion through the States, so long as they belong to either class of such commerce, but no further."

"2d. That the police power of the States was reserved to the States, and that it is beyond the reach of Congress; but that such police power extends to articles only which do not belong to foreign commerce or to commerce among the States at the time the police power is exercised in regard to them; and that the fact of their condition is a subject proper for judicial ascertainment."

On this subject see License Cases, 5 H., 589 to 592; Passenger Cases, 7 H., 424 to 427; Wynehamer vs The People, 3 Ker. 439; The People vs. Toynbee, 2 Park, C. R., 361 to 364; City of New York vs. Miln, 11 Pet.,157.

Sec. 7, Art. II, is null and void because it prevents the free and untrammeled commercial intercourse among the States and with foreign governments, by requiring the importer to go to the expense and trouble of furnishing the common carrier with a copy of the certificate authorizing the importer to sell such intoxicating liquor, certified by a Justice of the Peace to be correct, and should the carrier bring such liquors into the State of Iowa without first procuring or being furnished with such certificate, he renders himself liable to a criminal prosecution. This applies to all importers of liquors. It makes no distinction between the domestic and and foreign importer. Both are taxed alike. Both are required to furnish certificates. It is true Sec. 2, Art. 1, provides for the sale of foreign imported liquors, but it does not provide how such liquors are to be brought into the State; that is provided for in the section under consideration, by imposing a tax on the importer in the shape of a fee to be paid for the required certificates, before the carrier is allowed to bring such foreign liquors into the State. It is a tax on imports. A tax on the importer is equivalent to a tax on the import, and comes within the rule laid down in Brown vs. Maryland, 12 W., 448, "Any charge on the introduction and incorporation of the article into and with the mass of property in the country, must be hostile to the power given to Congress to regu-

late commerce, since an essential part of that regulation, and principal object of it is to prescribe the regular means for accomplishing that introduction and incorporation." Neither can a citizen of Iowa import liquors from another State for his own private use without taking out the certificate authorizing him to sell liquors, and furnishing a certified copy of the same to the common carrier. Gray *vs.* The Clinton Bridge, *et al.* A. Law, Reg., Vol. 7, No. 3, 149, Halderman vs. Beckwith, 4 McLean, C. C. R., 295; Crandall vs. The State of Nevada, 6 Wal., 44, 48 and 49.

Sec. 1, Art. III, is repugnant to Art. I, Sec. 8, and Art. 14, Sec. 1, of the U. S. Constitution, because it discriminates in favor of the citizens and products of the State of Iowa as against citizens of the United States and the products of other States, by providing for the "manufacture and sale of beer, cider from apples, or wine from grapes, currants, or other fruits grown in this State." This section evidently prohibits the sale of wine manufactured in the State of Iowa from grapes or currants grown in a sister State. In order to legalize the sale of wine, it must be manufactured from grapes, currants or other fruits grown in the State of Iowa. The products of a sister State cannot be manufactured into wine in this State. Hence there is an unjust discrimination in favor of the products of Iowa as against all the other States, which brings it within the rule laid down in Woodruff vs. Parnham, 8 Wal., 140; Hinson vs. Lott, 8 Wal., 150, 151, 152, and State of Mo. vs. North & Scott, 27 Mo., 464, 473, 476, 578, 480 and 481. See argument 468.

As an additional support of the several positions in relation to the commercial power of Congress, see: Gibbons vs. Ogden, 9 W., 186 to 222; Brown vs. Maryland, 12 W., 439 to 449; License Cases, 5 H., Taney's, C. J., opinion, 574, 577,578, 582 and 583; Passenger Cases, 7 H., 394, to 397, 401, 403, 404, 306, and 407, J. Wayne, 410 and 412, J. Grier, 464, and C. J. Taney 492; Steamship Co. vs. Port Warden, 6 Wal., 31, Story on the Constitution, 2 Vol., Sec, 1065, 1067, 1071, and 1072; Wynehamer vs. The People, 3 Ker., 399; People vs. Moring, 47 Bar.

642 ; Erie R. R. Co. vs. State, 2 Vroom, 534 to 546 ; Ward vs. State of Maryland, Dec. Term, 1871, U. S. Supreme Court, Haldeman vs. Beckwith & McLean, C. C. R., 286 ; Moore vs. Veazie, 32 Maine, 363, State vs. North & Scott, 27 Mo., 473 ; Low vs. Austin, 11 A. L. Reg., 366.

IV.

Sec. 15, Art. 1, is null and void, because,—

1st. It forbids the maintainance of an action for the recovery of intoxicating liquors or the value thereof. Preston vs. Drew, 33 Maine, 562.

2d. It impairs the obligations of contracts, because it denies a remedy for the enforcement of contracts made before the law took effect, which were not to be executed until after the law took effect, and of those made since the law took effect. McCormick vs. Rush, 15 Iowa. 130 ; Chicago vs. Sheldon, 9 Wal., 55, and The City vs. Lanson, 9 Wal., 477 ; Dartmouth Col., vs. Woodward, 4 W., 578, Story on Constitution, Sec. 1368 to 1393 ; Gelpecke vs. Dubuque, 1 Wal., 175 ; Harringer vs. Tama County, 3 Wal. 294 ; Lathrop vs. Brown, 10 A. M. Law Reg., N. S. 638 and note ; French vs. Tumlin, Ibid 641 and note.

V.

It was further claimed by the defense in the Court below, that the statute under consideration is null and void. 1st. Because under Sec. 18 of the act, the law could not take effect unless it received the assent and approval of a majority of the legal voters of the State of Iowa. Santo vs. The State, 2 Iowa, 223 ; Rice vs. Foster, 4 Harring, 189.

2d. It is not uniform in its operation. It declares an article of property under certain circumstances a nuisance, and under others it declares it not a nuisance—a change of ownership or location, not ingredients, is all that is required to work this wonderful change ; and it grants exclusive privileges and immuni-

ties to all citizens of the State of Iowa who are not engaged in the business of keeping a hotel, saloon, eating house, grocery or confectionary store. Geebrick vs. The State, 5 Iowa, 491 ; McCormick vs. Rush, 15 Iowa, 129. Const. Debates, Iowa, Vol. 1, 200.

3d. It is in conflict with the patent laws of the United States because it makes no distinction between liquors or bitters possessing intoxicating qualities, that are patented and those that are not patented under the laws of the United States. Its prohibitory features operate alike upon both.

Ex parte Major J. Robinson, U. S. C. C. for the District of Indiana, Justice Davis presiding, Chicago Legal News, Vol. 2,297.

4th. It interferes with the collection of the internal revenue. If the United States Marshal, by order of the U. S. District or Circuit Court, for the District of Iowa, seize intoxicating liquors, that have been forfeited under the internal revenue laws of the United States, can he sell such liquors in the State of Iowa contrary to the prohibitory statute ? If so, what title and what rights does the purchaser receive ? Can the purchaser thereof sell them in the State of Iowa ? And if the Marshal cannot sell such liquors in the State of Iowa, or if he can sell them and the purchaser thereof cannot sell them under the title he receives from the United States, does not the act prohibiting such sale, in either case, interfere with the enforcement of the laws of the United States for the collection of internal revenue for the support of the Federal Government, and therefore render it null and void ? McCulloch vs. Maryland, 4 W., 316.

VI.

As the counsel for the defendant in error, when this case was submitted at the last term of this Court, to support his case, cited :—

McGuire vs. The Commonwealth, 3d Wal. 387 ; State vs. Backman, State vs. Munzenmeyer, State vs. Baylor, State vs. Stutz, License Tax Cases, 5 Wal., 462 and 475. It is to be pre-

sumed he will do so again. These cases do not reach the case at bar. The question before this Court in those cases was, whether a license granted by the United States authorized the sale of liquors, notwithstanding the statutes of the several States. The points settled in those cases are not raised in this case. We rest our defence on entirely different grounds, some of which could not have been raised at that time, because the 14th amendment to the Constitution of the United States had not then been adopted, and this Court did not then possess jurisdiction to decide the questions raised by the plaintiff in this case. I have been wholly unable to find a single case decided by this Court where the question of total prohibition was involved, except as raised in the cases last above cited.

There is a wide difference between the law held constitutional by the Supreme Court of Iowa, in "Our House No. 2 vs. State, 4 Greene, 172, and Zumhoff vs. the State, Ibid., 326, and cited by that Court, when deciding this case, to sustain their decision, and the present law. That law regulated the sale of liquors by retail only, and this prohibits the sale absolutely. That did not of itself work a destruction of property, and this does. This forbids importations except for certain specified purposes, and that admited them without limitations. That permited the manufacture and traffic in those commodities as articles of merchandise, and this forbids such manufacture and traffic.

I most respectfully submit that the case at bar presents many new and very important questions for the consideration of the Court; that the record does establish beyond controversy that the written plea, filed in the Court below by the plaintiff in error, was all the evidence given and received on the trial of this cause, (see Trans., 4, 6 and 7;) that it does not alter the rights of the plaintiff in error, even though the record does fail to show that fact, for if the law is null and void for any purpose whatever, it is absolutely null and void for all purposes, and cannot be legally enforced, and that the decision of the Supreme Court of Iowa is erroneous and should be reversed.

WM. T. DITTOE,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

F. BARTEMEYER, Sr., *vs.* THE STATE OF IOWA. } Assignment of Errors. Dec. Term, 1872.

Afterwards, to-wit: on the first Monday of December in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, comes the said F. Bartemeyer, Sr., by Wm. T. Dittoe, his attorney, and says, that in the record and proceedings aforesaid, there is manifest error in this, to-wit:

1st. That the Supreme Court of the State of Iowa erred in affirming the decision of the Circuit Court of the State of Iowa, in and for Scott County, overruling the demurrer of the defendant to the information.

2d. That the said Supreme Court of Iowa erred in affirming the decision of said Circuit Court, overruling the defendant's motion to dismiss this cause and quash these proceedings.

3d. That said Supreme Court of Iowa erred in affirming the decision of said Circuit Court, overruling defendant's motion in arrest of judgment.

4th. That the said Supreme Court of Iowa erred in affirming the decision of the said Circuit Court, sustaining the plaintiff's verbal motion, made in open Court and entered of record, for the conviction of the said defendant, Bartemeyer, Sr., on the facts alleged in his written plea filed in this cause, and holding said written plea insufficient in law to constitute a defense; which said written plea is in words and figures following, to-wit: "And now comes the defendant, F. Bartemeyer, Sr., and for plea to the information in this cause, says, he admits that, at

the time and place mentioned in said information, he did sell and deliver to one Timothy Hickey, one (1) glass of intoxicating liquor, called whisky, and then and there receive pay in lawful money from said Hickey for the same. But defendant alleges that he committed no crime known to the law by selling the intoxicating liquor hereinbefore described to said Hickey, for the reason, that he, the defendant, was the lawful owner, holder and possessor in the State of Iowa, of said property, to-wit: said one glass of intoxicating liquor sold as aforesaid to said Hickey, prior to the day on which the law was passed under which these proceedings are instituted and prosecuted, known as the act for the suppression of intemperance, and being chapter sixty-four (64) of the Revision of 1860; and that prior to the passage of said act for the suppression of intemperance, he was a citizen of the United States and of the State of Iowa."

5th. The said Supreme Court of Iowa erred in affirming the judgment rendered by said Circuit Court against the defendant.

6th. The said Supreme Court of Iowa erred, because the act of the Legislature of the State of Iowa, with the amendments thereto, entitled "An Act for the Suppression of Intemperance," being chapter sixty-four (64) of the Revision of 1860, is opposed to the common weal of the United States, and in conflict with and in violation of the Constitution and laws of the United States.

Whereupon the said F. Bartemeyer, Sr., prays that the judgment aforesaid may be reversed, annulled and held for naught, and that he may be restored to all things which he has lost by reason of said judgment.

WM. T. DITTOE,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1871.

——: o :——

F. BARTMEYER, SR., PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA, DEFENDANT IN ERROR

——: o :——

ARGUMENT OF HENRY O'CONNOR, ATTORNEY GENERAL OF IOWA, *For Defendant in Error.*

G. W. Edwards, State Printer, Des Moines.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1871.

——: o :——

F. BARTMEYER, SR., PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA DEFENDANT IN ERROR.

——: o :——

ARGUMENT OF HENRY O'CONNOR, ATTORNEY-GENERAL OF IOWA, *For Defendant in Error.*

——: o :——

STATEMENT OF THE CASE.

This case comes from the Supreme Court of the State of Iowa, upon writ of error, and arises under what is known as the Prohibitory Liquor Law of that State. So much of the Statute in question as is material to the questions involved in the case at bar is here inserted:

(Sec. 6.) "If any person by himself, his clerk, servant or agent, shall for himself or any person else, directly or indirectly, or on any pretence, or by any device, sell, or in consideration of the purchase of any other property give to any other person any intoxicating liquor, he shall be

deemed guilty of a misdemeanor, and shall on his first conviction for said offense, pay a fine of twenty dollars and the costs of prosecution, and shall stand committed ten days unless the same be sooner paid. On the second conviction, a fine of fifty dollars and stand committed thirty days, unless the same be sooner paid, and on the third and every subsequent conviction, he shall pay a fine of one hundred dollars and the costs of prosecution, and shall be imprisoned in the county jail not less than three, nor more than six months, and in default of payment of the fines provided for the first and second convictions under this section the person so convicted shall not be entitled to the benefit of section 3268 of the Code (Poor Convict's Act) until he shall have been imprisoned sixty days, all clerks, servants and agents of whatsoever kind, engaged in the manufacture, sale or keeping for sale in violation of this act, of any intoxicating liquor, shall be charged and convicted in the same manner as principals, may be and shall be subject to the penalties herein provided. Indictments and information under this sections may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged, as on separate indictments or informations, but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and third convictions however mentioned in this section shall be construed to mean convictions on separate indictments, or informations."

Revision, section 1562.

Another section of the act provides against the manufacture of liquors, and still another against keeping liquors with intent to sell. The act also provides that prosecutions under it may be had before Justices of the Peace. A subsequent amendment provides that, under certain conditions and restrictions, liquor may be sold for medicinal, mechanical, and culinary purposes.

Acts of 1857, ch. 157, p. 231.

A later amendment, passed April 10th, 1858, by the the Sixth General Assembly, excepted beer from the list

of intoxicating liquors; and excepted, also, cider and wine manufactured from apples and grapes grown in the State of Iowa.

The above embraces substantially the provisions of the Iowa Prohibitory Liquor Law.

On the 21st of March, 1870, the plaintiff in error, F. Bartmeyer, Sen., was charged, before a Justice of the Peace, in Scott county, Iowa, with selling intoxicating liquors of the kind prohibited by law, in violation of the provisions of section 1562 of the Revision (that being the section first above quoted in full). He was convicted before the justice; from the judgment of the justice he appealed to the circuit court, where, upon a trial *de novo*, he was again convicted. From this latter judgment he appealed to the Supreme Court of Iowa; and at the June term, 1871, of the Supreme Court, the judgment of the Scott county circuit court was affirmed. The opinion of the Iowa Supreme Court is set out in form of appendix to this brief.

ARGUMENT.

As I read the record of this case, may it please the court, I find myself wholly unable to discover in it any question that has not been again and again decided by this court, settled under this particular statute, in cases from Iowa, viz:

State v. *Bachman.*
State v. *Munzenmeyer.*
State v. *Bayon.*
State v. *Stutz.*

State *vs.* Bayon, and State *vs.* Stutz, decided at December term, 1867, of this court not reported, as no opinions were written except a simple affirmance, and under similar statutes from many other States in the Union; certainly

from Massachusets, Rhode Island, New York, New Jersey, and Pennsylvania.

McGuire *vs.* The Commonwealth, 3d, Wallace, 387.

Mr. Justice Nelson, in delivering the opinion of the court in the above case, says:

"Whatever might be the effect of this license as to the rights under it in the absence of other prouisions of the act of Congress, a question not involved in the case, and therefore not material to be noticed; it is quite clear that it conferred no right or authority on the defendant below, and hence furnished no defense to the indictment under the laws of the State."

"The 67th section of the act of Congress enacts that no license hereinbefore provided for is granted, shall be construed to authorize the commencement or continuation or any trade or business occupation or employment therein, mentioned within any State or Territory of the United States, in which it is or shall be specially prohibited by the laws thereof, or in violation of the laws of any State or Territory. In view of this provision, continues the learned judge, it is in vain to attempt to give power or effect to the license against the State law; and hence the authority derived from it, upon which the defendant relied for his defense in the court below, fails."

See also the license tax cases, 5th, Wallace, 462, and

Pervear *vs.* The Commonwealth, 5th, Wallace, 475.

In the license tax cases above cited, Chief Justice Chase, in delivering the opinion of the court, uses this language:

"This court can know nothing of public policy except from the Constitution and laws, and the course of administration and decision. It has no legislative powers; it cannot amend or modify any legislative acts; it cannot examine questions as expedient or inexpedient as politic or impolitic. Considerations of that sort must, in general, be addressed to the Legislature. Questions of policy determined there are concluded here.

"The Legislature has thought fit, by enactments clear of all ambiguity, to impose penalties for unlicensed dealing in lottery tickets, and in liquors. These enactments, so long

as they stand unrepealed and unmodified, express the public policy in regard to the subjects of them. The proposition that they are contrary to public policy, is, therefore, a contradiction in terms, or it is intended as a denial of their expediency or their propriety. If intended in the latter sense, the proposition is one of which courts cannot take cognizance."

Much further back in the history of this court, its decisions are found to be uniform and emphatic on the right, the unqualified and exclusive right, of the States to enact such laws as the wisdom of the Legislature might deem necessary to the preservation of the health, morals, and good order of society, and such police and penal statutes as they deemed necessary to regulate the personal conduct of the inhabitants.

Now has this court stopped with the mere declaration of the right of the United States. It has also, lent the sanction of its warm approval, of the soundness and wisdom of the State policy that dictated the enactment of laws for the suppression of the traffic in intoxicating liquors, the traffic and the use of which have been the two fruitful source of so much misery, vice, and crime from the earliest days of the Republic to the present time.

In the leading case on this question in the State of Iowa: *Santo, et. al.*, vs. *The State*, 2*d*, Iowa, 202.

The very learned and elaborate opinion of the court delivered by the late Justice Woodward is replete with citations from the decisions of this court and quotations from the languages of the judges, delivering its opinions, citing the case of *New York* vs. *Miln*, 11th Peters, 102.

This language of the opinion is given:

"It is not only the right but the bounden and solemn duty of a State to advance the happiness the safety and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise is not surrendered or restrained in the manner just stated,

that all those powers, which relate to merely municipal legislation, or what may, perhaps, be more properly called internal police, are not thus surrendered or restrained, and that consequently in relation to these, the authority of a State is complete, unqualified, and exclusive."

And to the same purport is cited the cases of *Thurlow* vs. *The State of Massachusetts*, *Fletcher* vs. *The State of Rhode Island, and Pierce* vs. *The State of New Hampshire* 5, Howard, 504.

In the cases just cited Chief Justice Taney uses these plain and pregnant words.

"But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation or diminish the profits of the importer or lessen the revenues of the general government, and if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

The case at bar presents the question in no new aspect, and in the light of these uniform decisions any attempt at argument on this side of the question would be superfluous if not impertinent, I respectfully submit that the judgment of the Supreme Court of Iowa should be affirmed.

HENRY O'CONNOR,

Attorney-General of Iowa, for defendant in error.

OPINION OF THE SUPREME COURT OF IOWA, JUNE TERM, 1371.

No. 3989.

THE STATE OF IOWA
vs.
F. BARTMEYER, Se.

COLE, J.

The counsel for appellant has favored us with an elaborate printed argument, in which he assails the act for the suppression of intemperance, as opposed to the common weal of the State of Iowa and the United Srates, and as in conflict with and in violation of the Constitution of the State of Iowa, and the constitution and laws of the United States.

We regard these questions as settled by the former decisions of this court, and in view of the large amount of business before us must content ourselves with simply referring to and following them :

Our House, No. 2 v. *The State*, 4 Green. 172.
Lyondoff v. *The State*, Ibid. 526.
Santo v. *The State*, 2, Iowa, 165.

It is, however, also urged that the plea of defendant admitting the sale, and which was read in evidence at the trial, avers that the defendant was the owner, holder, and

possessor in the State of said intoxicating liquor, at and prior to the passage of the law under which the prosecution was had; even if this latter fact would constitute a defense, which we do not determine yet, it would not help the defendant's case, because the transcript fails to show that the admissions and warrants of the pleas was *all the evidence.* Other testimony may have shown that he did not so own and possess them.

AFFIRMED.